

Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
 OFFICE OF THE SECRETARY

In the Matter of)	
)	
Implementation of Section 304 of the)	
Telecommunications Act of 1996)	CS Docket No. 97-80
)	
Commercial Availability of)	
Navigation Devices)	

OPPOSITION OF DIRECTV, INC.
TO PETITIONS FOR RECONSIDERATION

DIRECTV, Inc. ("DIRECTV")¹ hereby submits this Opposition in response to the petitions for reconsideration filed in the above-referenced proceeding.

I. INTRODUCTION

In its Order implementing Section 629 of the Communications Act,² the Commission adhered to Congress's objectives and appropriately accounted for the striking marketplace differences between cable television operators and direct broadcast satellite ("DBS") providers. The Commission correctly determined that, unlike cable set-top boxes, DBS set-top boxes already are commercially available and portable throughout the continental United States ("CONUS").³ Thus, the Commission properly concluded that the DBS equipment market

¹ DIRECTV is a wholly-owned subsidiary of DIRECTV Enterprises, Inc., a licensee in the DBS service and wholly-owned subsidiary of Hughes Electronics Corporation.

² *Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices*, CS Docket No. 97-80, Report and Order, FCC 98-116 (rel. June 24, 1998) ("Order").

³ Order at ¶¶ 64-66.

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already is subject to the type of competition that Section 629 was designed to induce. Based on this conclusion, the Commission excepted from its rules requiring the separation of conditional access functions multichannel video programming distributors (“MVPDs”), such as DBS providers, whose navigation devices operate throughout CONUS and are available from unaffiliated retail outlets and vendors throughout the United States.⁴ This exemption is amply justified by the record in this proceeding and the legislative history of Section 629; there simply is no basis for the Commission to reconsider this provision of its rules.

II. DBS NAVIGATION DEVICES PROPERLY ARE EXEMPTED FROM THE SECURITY FUNCTION UNBUNDLING REQUIREMENT

Congress’s goal in implementing Section 629 was “to assure the commercial availability”⁵ of equipment used to receive MVPD programming services. In the *Order*, the Commission determined that Section 629 applies broadly to cable television operators as well as to other MVPDs, as defined by Section 602(13), including DBS operators.⁶ In adopting rules to implement Section 629, the Commission appropriately recognized the marketplace distinctions among various MVPDs, in particular “the fact that DBS reception equipment is already nationally portable and commercially available.”⁷ Accordingly, the Commission exempted DBS providers from the requirement that MVPDs separate security functions from non-security functions.⁸

⁴ *Id.* at ¶ 66; see 47 C.F.R. § 76.1204(a)(2).

⁵ 47 U.S.C. § 549(a).

⁶ *Order* at ¶ 21.

⁷ *Id.* at ¶ 22.

⁸ *Id.* at ¶ 64. The Commission’s rule requiring separation of security functions does not apply to navigation devices that operate throughout CONUS and are commercially

The DBS exemption is justified by the presence of multiple DBS providers and by the widespread availability of DBS equipment from numerous unaffiliated sources, as well as by the negative impact that application of the rule would have on the evolving DBS service.⁹ As the Commission stated, “We are reluctant to implement a rule that could disrupt an evolving market that is already offering consumers the benefits that derive from competition.”¹⁰

The record in this proceeding supports the Commission’s exemption of DBS from the security function unbundling requirement. DIRECTV and Hughes Network Systems (“HNS”), for example, provided a detailed description of the competitive DBS equipment marketplace.¹¹ The record reflects that instead of forcing consumers to accept equipment exclusively from the service provider, DIRECTV and most other DBS providers allow consumers to purchase their equipment from a multitude of competing manufacturers and retailers.¹² Moreover, the record shows that this vigorous competition has allowed consumers to receive the benefits of lower prices and better service.¹³ Thus, the record supports the Commission’s conclusion that the DBS service already has achieved Section 629’s commercial availability goals.

available from unaffiliated sources, which includes DBS set-top boxes. *See* 47 C.F.R. § 76.1204(a)(2).

⁹ *Order* at ¶¶ 64-65.

¹⁰ *Id.* at ¶ 64.

¹¹ *See* Joint Comments of DIRECTV and HNS (filed May 16, 1997) (“DIRECTV/HNS Comments”), at 3-5, 9-12; Joint Reply Comments of DIRECTV and HNS (filed June 23, 1997), at 3-5, 11-13.

¹² *See Order* at ¶¶ 7, 22.

¹³ *See id.* at ¶ 64 (result of competitive DBS equipment market “has been lower equipment prices, enhanced options and features”).

The record also supports the Commission's conclusion that application of the security function unbundling rule would disrupt the evolving DBS service. Despite the recent growth of the DBS service, DBS subscribership constitutes only 8 percent of the MVPD market, as compared with the 87 percent market share still retained by the incumbent cable industry.¹⁴ As new entrants in a marketplace dominated by the cable industry, the Commission consistently has regulated DBS operators in a flexible manner to promote overall MVPD competition.¹⁵ The record reflects that imposing a security function unbundling requirement would in fact harm the evolution of the DBS market by impairing technological advancement and efficient operation of DBS service, as well as by increasing the cost to consumers of switching service from cable operators to DBS providers.¹⁶ Thus, the Commission properly concluded that regulation in the form of unbundling would be counterproductive to the Commission's long-standing goal of fostering MVPD competition to the incumbent cable industry by supporting evolving new services such as DBS.

Moreover, separating the security function from the other functions of DBS navigation devices would "disrupt technical . . . structures that arose in a competitive marketplace."¹⁷ The record shows that DBS service providers protect their systems against theft of service through the use of various security devices, including "smart cards" which operate in conjunction with other interdependent security control devices.¹⁸ The record also reflects that it

¹⁴ *Id.* at ¶ 65.

¹⁵ *See id.*

¹⁶ *See* DIRECTV/HNS Comments at 17-18.

¹⁷ *Order* at ¶ 64.

¹⁸ DIRECTV/HNS Comments at 17-18.

would be impossible for DIRECTV and other DBS providers to prevent or correct security breaches solely through the use of smart cards.¹⁹ The Commission thus correctly considered technical disruption to DBS systems that would be caused by imposing a security function unbundling requirement on DBS providers.²⁰

In adopting its regulatory framework, the Commission did not “pick and choose” from among various MVPDs in applying Section 629, as one petitioner suggests.²¹ Rather, it applied the statute fully to all MVPDs and then determined that DBS providers already satisfy the standards for commercial availability set forth in Section 629. The petitioners have not alleged, let alone attempted to prove, that the Commission’s findings regarding the competitive nature of the DBS equipment market were incorrect. Instead, one petitioner needlessly reviews the MVPD definition in the Communications Act,²² without recognizing that the Commission’s *Order* in no way excludes DBS from the Act’s definition. Simply put, the status of DBS providers as MVPDs does not end the Commission’s inquiry. The Commission appropriately considered whether it was proper to apply the security function unbundling requirement to an MVPD that already meets the goals that the requirement is designed to achieve. No petitioner has challenged that conclusion, which is amply supported both by the record and by the legislative history.

The DBS exemption from the unbundling requirement is consistent with the legislative intent behind Section 629. In enacting Section 629, Congress sought to provide relief

¹⁹ See *Order* at ¶ 59; DIRECTV/HNS Comments at 17-18.

²⁰ See 47 U.S.C. § 549(b).

²¹ Time Warner Petition For Reconsideration at 16.

²² *Id.* at 16-17.

to cable television subscribers who are forced to rent their converter boxes and other equipment from a monopoly cable operator at inflated rates. In Commissioner Powell's words, "[t]he real purpose of Section 629 was to ensure that consumers are not hostages to their *cable* operators."²³ According to Senator Hollings, Section 629 was intended to eliminate cable's "monopoly over set-top boxes" by allowing "consumers to purchase *cable* set-top boxes on a retail basis from stores."²⁴ Senator Snowe, a cosponsor of a predecessor bill to Section 629, observed that consumers with "absolutely no choice with respect to set-top boxes . . . are forced to rent them from *cable* companies, often as a requirement to receiving cable signals."²⁵ Senator Leahy urged his colleagues to "adopt a provision designed to make *cable* equipment cheaper and easier to use for all consumers, who are tired of paying rent for *cable* converter boxes Under [Section 629], the FCC is directed to assure the competitive availability to consumers of converter boxes and other electronic equipment used to access *cable* video programming services."²⁶ In contrast, as the Commission noted in the *NPRM*, the legislative history "does not appear to reflect any concern with [the DBS] mode of operation."²⁷ The record in this proceeding reveals the soundness of Congress's, and the Commission's, focus on the cable industry, as the record shows

²³ *Order*, Separate Statement of Commissioner Michael K. Powell, dissenting in part (emphasis added).

²⁴ 142 Cong. Rec. S689 (daily ed. Feb. 1, 1996) (emphasis added).

²⁵ 141 Cong. Rec. S7992 (daily ed. June 8, 1995) (emphasis added).

²⁶ 142 Cong. Rec. S693 (daily ed. Feb. 1, 1996) (emphasis added).

²⁷ *Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices*, CS Docket No. 97-80, Notice of Proposed Rulemaking, FCC 97-53, at ¶ 22 (rel. Feb. 20, 1997) ("*NPRM*").

that the structure of the DBS equipment market is strikingly different from that of the cable industry.

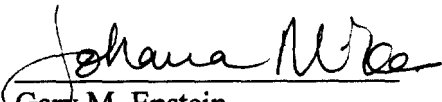
Thus, the Commission's decision to exempt DBS set-top boxes from the security function unbundling requirement is supported by the record and legislative history. Moreover, it makes eminent sense from a policy and technical standpoint. DBS set-top boxes are commercially available and portable throughout CONUS, and thus already fulfill Section 629's goals. In addition, imposing the security function unbundling requirements on the evolving DBS industry, which constitutes the principal MVPD alternative to the incumbent cable industry, would be counterproductive to the Commission's goal of fostering MVPD competition.

III. CONCLUSION

The Commission should not undo the success that it has achieved thus far in fostering technology development and innovation through its flexible regulatory approach to the DBS service. DBS has enjoyed substantial success to date, but is still a long way from eroding the market power that cable companies retain in the MVPD market. Requiring DBS to separate security and non-security functions would undercut both the intent of Congress and the Commission's stated policy of ensuring the benefits of competition while minimizing governmental intrusion into the marketplace. The Commission therefore appropriately and correctly acknowledged that Section 629's commercial availability goals already are satisfied for DBS equipment and properly excepted DBS from the rule requiring unbundling of security functions.

Respectfully submitted,

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Dated: September 23, 1998